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I, William H. Bernard, President and Founder of Access Television Network, Inc.

("ATN"), am writing in response to the request for comments made by the Federal Communications Commission ("FCC" or "the Commission") concerning commercial leased access ("CLA") in the *Further Notice Proposed Rulemaking*, MM Docket No. 92-266, CS Docket No. 96-60, FCC 96-122, ¶ 44 (released Mar 29, 1996)("NPRM"). As these comments demonstrate, a genuine outlet already exists for long-form advertisers and infomercials, and thus CLA rates or rules that would promote increased channel time for these entities is unnecessary and would be contrary to both Congressional intent and the public interest.

Background And Overview of ATN

Cable systems are already making channel time available to long-form advertisers and infomercials through companies such as ATN that identify under-utilized program time on cable systems (referred to as "remnant time") and sell the time to infomercial producers and advertisers at reasonable rates. ATN operates the largest network exclusively dedicated to the distribution of long-form paid programming, principally infomercials. The infomercials exhibited by ATN are typically 30-minute television commercials produced in either documentary or talk show format featuring educational, self-improvement, fitness, kitchen and consumer products.¹ ATN distributes the infomercials to cable operators and currently

¹Examples include major producers of infomercial, notably those of Nordic Track, Health Rider, and Victoria Principal, as well as lesser known entities such as Magination Entertainment, Brad Richdale, Mega Systems, and Bosley Medical Institute.

reaches 16 million homes for at least 6 hours a day on over 200 cable systems.² ATN has no ownership ties to the cable industry.

Until recently, many cable operators were unaware of the large amount of remnant time that existed on their systems. Such remnant time includes off-air periods of broadcast channels and cable networks, classified ad channels, barker channels, default channels, duplicated signals, and unfilled local origination time. In ATN's experience, a cable system has 12 hours per day of such remnant time that can be utilized for infomercials and long-form advertising.

ATN was founded in 1993 based on the extant amount of remnant time on cable systems. ATN's founders saw an opportunity for a service that would act as intermediary between cable systems that were losing revenue as a result of under-utilized channel capacity and long-form advertisers seeking reasonably priced, half-hour blocks of time on which they could effectively market their goods and services. In addition to making life easier for cable systems, ATN offers long-form advertisers, including infomercials, a more efficient, reasonably-priced method of purchasing time on cable systems nationwide. ATN sells blocks of time that are rotated on cable systems nationwide throughout the programming day so that advertisers are not limited to time slots with relatively low levels of viewers, such as 3 AM to 6 AM. In addition, ATN eliminates the need for advertisers to negotiate with each cable system individually. Finally, ATN's rates are lower than if the advertiser negotiated independently with each cable system for individual blocks of time. The fees that long-form

²ATN has contracted with most of the largest MSOs, including TCI, Time-Warner, and Continental, for blocks of remnant time.

advertisers pay ATN are based on the full-time equivalent ("FTE"), a measurement of the number of subscribers that would be covered by ATN if it were a single 24-hour channel. ATN currently reaches approximately 6 million FTE subscribers and sells time over the network at a rate of approximately \$2.16 per FTE subscriber.

ATN has invested \$10 million in start-up costs to date, including \$2.2 million for the establishment of a state-of-the-art video delivery as well as securing a satellite transponder lease valued at \$10.6 million. ATN has incurred a total of \$9.1 million in losses in fiscal years 1994, 1995, and 1996 and does not expect to break even financially until 1998.

Specific attributes of ATN's distribution network include: an twelve-year satellite transponder sub-lease on Hughes Communications Galaxy VII, digital compression technology that allows delivery of four digitally compressed video signals to each of the approximately 200 headends of ATN's cable affiliates, and ATN-owned equipment (an integrated receiver/decoder and a program switcher) located at each headend. In short, ATN has made these significant investments in the reasonable belief that remnant time would continue to be available. Commission action that reduces the amount of remnant time available on cable systems would have a serious and detrimental impact on ATN.

ATN's comments address the issue of: (1) whether commercial advertising qualifies as CLA programming; (2) the rates that cable operators should be permitted to charge advertisers on CLA; (3) whether a minimum time requirement is necessary for part-time carriage; and (4) whether resale of CLA programming time should be permitted.

Proposals

1. **The Commission should clarify that CLA does not apply to long-form advertising and/or infomercials.**

Congress did not intend for CLA obligations to extend to commercial advertising. In adopting the CLA provision of the 1984 Cable Act, Congress' goal was to "divorc[e] cable operator editorial control over a limited number of channels." H.R. Rep. No. 98-943, 98th Cong. 2d Sess. 50 (1984) ("1984 House Report"). It is clear from the legislative history accompanying Section 612 that Congress was concerned with cable operators' control over a scarce number of full-time channels. *See, e.g.*, 1984 House Report at 47 ("Leased access is aimed at assuring that cable *channels* are available . . .") (emphasis added). Congress was not concerned with the amount of media time available to long-form advertisers because such time was available in abundance, on broadcast stations as well as cable systems, and remains available today. In fact, today such time is more abundant primarily because of numerous companies such as ATN that identify and sell remnant time on cable systems to long-form advertisers.

If Congress had intended to include advertising in CLA, it would have clearly manifested its intent in the language of the Act. *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 633 (D.C. Cir. 1939). In fact, Congress did not intend such a result and the Commission must give effect to Congress' intent. *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)); *see also Bohnam v. D.C. Library Admin.*, 989 F.2d 1242, 1245 (D.C. Cir. 1993).

Instead, Congress intended to increase diversity and competition in video

programming sources. 1984 House Report at 47, 1991 S. Rep. No. 102-92, 1st Sess. (1991) at 30. According to canons of statutory construction and FCC precedent, Congress' use of the term "video programming" should be construed according to the common usage of the term in 1984. Sutherland, *Statutory Construction*, § 47.28 (5th Ed. 1992) at 248; *see also Video Dialtone Order*, 7 FCC Rcd. 5781, 5820-1 at ¶ 74 (1992). Then, as now, "programming" was generally considered to have entertainment and/or informational value apart from merely selling a product. The Commission has distinguished between programming and advertising in other contexts as well. *See e.g., Policies and Rules Concerning Children's Television and Programming*, 6 FCC Rcd. 2111, 2112 (1991).

The only court that has specifically addressed this issue has concluded that CLA obligations to do not extend to advertising. In *Sofer v. United States*, No. 2:94cv1182, slip op. at 8 (E.D. Va. June 7, 1995), the court held that "the leased access provision of the Cable Act and related regulations . . . have no application to commercial advertising." The fact that *Sofer* concerned a 30-second advertisement does not diminish its precedential value -- an advertisement does not qualify as programming simply because it exceeds the typical length that most advertisers can afford.

Moreover, a "genuine outlet" already exists for long-form advertisers. In requiring cable operators to offer part-time CLA, the Commission relied exclusively on Congress' expressed intent in the legislative history to provide CLA programmers a "genuine outlet" for their product.³ NPRM at ¶ 47. However, this outlet already exists, as evidenced by the very

³Indeed, it is questionable whether Congress ever intended commercial leased access to be part-time. As the Commission has correctly noted, "the statute does not specifically address the question of rates for part-time use." NPRM at ¶ 43. Moreover, the legislative history of

existence of companies such as ATN, whose principal purpose is to identify and sell this time to long-form advertisers. Clearly, if no genuine outlet existed for long-form advertisements, ATN and similar companies would have nothing to offer their programming customers. But this is simply not the case: ATN alone reaches 16 million homes for at least 6 hours a day on over 200 systems.

The Commission should recognize that natural market forces have induced entrepreneurs to provide a service that is valuable to long-form advertisers, cable operators, and cable subscribers alike. These market forces are producing efficiencies and win-win solutions for system operators, infomercial programmers, and companies such as ATN that regulations -- especially those based on a fundamentally flawed premise -- could never hope to achieve. For example, ATN offers long-form advertisers a much more efficient and less costly means of purchasing time on cable systems. ATN eliminates the need for long-form advertisers to negotiate for time on a system-by-system basis, by packaging remnant time on systems around the country into national sales opportunities. And in the near future, ATN will also perform demographic studies so that advertisements can be targeted to the ideal market(s) for the given product.

In short, the Commission's proposed part-time CLA rates and rules will *not* create a genuine outlet -- they will create market distortions

2. **The part-time CLA rates should be based on commercial advertising rates.**

The Commission requested comment on whether proration of the maximum rate with

47 U.S.C. § 612 makes no mention of part-time CLA.

time-of-day pricing is appropriate under its proposed cost/market rate formula for part-time rates. NPRM at ¶ 102. Extremely low advertising rates, such as those created by a pro-rata formula, will cause traditional programmers to migrate quickly to CLA. This would have a serious and detrimental impact on ATN. Moreover, it is not "consistent with the growth and development of cable systems," as required by Section 612. Even under the implicit fee formula, proration resulted in part-time rates that were set well below market rates for advertising on cable systems. See, e.g., Responses filed in *Lorelei Communications, Inc. d/b/a The Firm v. Continental Cablevision, Wilmington, MA, CSR 457-L* (filed August 9, 1995) and *Lorelei Communications, Inc. d/b/a The Firm, Manchester, NH*, (filed July 27, 1995). Should the Commission follow through with its proposal to apply a pro-rated cost/market rate formula (which will inevitably yield lower rates than the implicit fee formula) to part-time rates, the result will be to create subsidized part-time CLA rates that are far below the market-based rate for commercial advertising. Naturally, advertisers will migrate away from traditional cable advertising to the less costly CLA channels. This migration will certainly deprive cable systems of advertising revenues -- and eventually usurp four to ten channels of full-time channels, which corresponds to a very substantial amount of part-time programming capacity. A rate that subsidizes advertisers and distorts the competitive market rate for traditional cable advertising is inconsistent with Congress' stated goal: to increase diversity in programming sources in a manner consistent with the growth and development of cable systems. 47 U.S.C. § 612.

To avoid this result, which Congress never intended, the Commission must ensure that part-time programming is priced comparably to commercial advertising time on cable systems.

3. **Part-time CLA rates should be restricted to blocks of programming time in excess of eight hours and should not include repetitive programming.**

The Commission tentatively selected a minimum time increment of eight hours within a 24-hour period before a cable operator is required to open up an additional CLA channel, and requested comment on this conclusion. NPRM at ¶ 125. A minimal time increment is appropriate given that a genuine outlet already exists for infomercial producers. Without these limitations, long form advertisers will fill up the maximum number of set-aside channels with infomercials because of the low rates. Should this occur, available remnant time for companies such as ATN would be dramatically diminished. ATN suggests, however, that the time increment should be at least twelve hours and that the Commission adopt further limitations on this minimal time requirement, such as restrictions on repetitive programming.

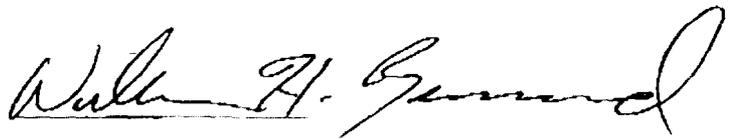
Similarly, the Commission should restrict the amount of repetitive programming that CLA programmers may transmit. Otherwise, infomercials and long-form advertisers who could easily purchase eight hours of programming on CLA will simply purchase numerous blocks and repeat their programming over the course of the eight hour interval.

4. **The Commission should not permit resale of leased access time.**

The Commission requested comment on whether it should permit leased access time to be resold by the lessee. NPRM at ¶ 141. ATN submits that the Commission should not permit resale because it is unnecessary -- ATN and other companies are essentially providing such services today. ATN has invested \$ 10 million in start-up costs in reliance upon the current amount of available remnant time and the Commission's original interpretation of Section 612. If the Commission permits resale of CLA at below-market rates, it will

Penalizes entrepreneurs that have invested substantial resources in reliance upon the current amount of remnant time would be completely unjust.

In summary, given that a genuine outlet already exists for long-form advertisers and infomercials, I urge the Commission to carefully consider the impact that its CLA rates and rules will have on companies such as ATN as it proceeds toward final resolution of these important issues.

A handwritten signature in black ink, appearing to read "William H. Gammell". The signature is fluid and cursive, with a large, looping initial "W".

Sincerely,